



Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

RE: DOCKET NO. R-1176: PROPOSED RULE TO AMEND REGULATION CC

Dear Ms. Johnson:

The Consumer Bankers Association¹ (the "CBA") is please to have the opportunity to submit these comments in connection with the Federal Reserve Board's (the "Board") proposed amendments to Regulation CC to implement the recently-enacted Check Clearing for the 21st Century Act (the "Check 21 Act").

The CBA commends the Board's efforts to implement the Check 21 Act by regulation. The CBA feels that the addition of the new subpart D, with commentary, to Regulation CC will provide the Board with the flexibility to respond to needed change as the industry and consumers gain experience with the Check 21 Act once it becomes effective.

The CBA supports adoption of the proposed amendments in substantially the form proposed by the Board. Notwithstanding our support, we have certain questions, comments and suggestions regarding a few of the specific provisions of the proposed amendments. These comments focus primarily on those issues which we feel will affect the retail operations of our members.

¹ The Consumer Bankers Association is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

COMMENTS TO PROPOSED AMENDMENTS TO REGULATION CC TO IMPLEMENT THE CHECK 21 ACT

Delivery of Consumer Awareness Disclosure

Section 229.57 of the proposed amendments implements the consumer awareness disclosure provisions of the Check 21 Act, which require that a bank provide its consumers with a notice describing substitute checks and explaining consumers' recredit rights. Section 229.57 provides that banks must provide the required disclosure to a consumer in two situations: (i) as an initial disclosure to the bank's consumers who currently receive paid checks in their statements, and (ii) on an ad hoc basis to a consumer who has not received an initial disclosure and who receives substitute checks only on an occasional basis.

The CBA requests the Board's clarification with respect to which consumers are entitled to be provided with the initial disclosure. Section 12(b)(1) of the Check 21 Act clearly states that it is customers who receive "original checks or substitute checks" that are entitled to the disclosure. However, proposed section 229.57(b)(1) introduces a new term, providing that a consumer who "receives *paid checks* with his or her periodic statement" (emphasis added) must be provided the required initial disclosure. We assume that the term "paid check" is intended to mean the paid original check. Many banks now provide electronic images of or information related to checks to consumers in their periodic statements rather than the actual "paid checks," which images / information are neither original checks nor substitute checks. The CBA believes that although a bank may choose to provide the initial disclosure to consumers who only receive such images of or information relating to paid checks, they are not required to do so under the Check 21 Act or the proposed amendments because these consumers are not currently receiving original checks or substitute checks in their statements, and requests that the Board clarifies that this is the case.

For consumers who have not been provided with an initial disclosure in accordance with section 229.57(b)(1) and who receive substitute checks only on an occasional basis, the Board has proposed two alternative approaches for when the disclosure is required to be provided to such a consumer who requests an original check or a copy of a check: i) at the time the consumer makes the request, or ii) at the time the bank provides the requesting consumer with a substitute check rather than an original check or copy of a check. In response to the Board's specific request for comment on which of these two alternatives is preferable, the CBA strongly supports the second alternative, delivery of the disclosure at the time the bank actually delivers the substitute check.

We agree with the Board that the first alternative, delivery at the time the consumer makes the request, may cause banks to incur unnecessary expense and also may cause unnecessary confusion for consumers. At the time a request is made by a consumer, the bank may not yet know whether it will be providing the consumer with an original check, a copy of the check or a substitute check. Requiring a bank to provide a disclosure describing substitute

checks at the time the request is made in circumstances where the bank does not subsequently provide the consumer with a substitute check will result in the bank having incurred the cost of providing a disclosure which is not only not needed by or even relevant to the consumer (who did not receive a substitute which is the subject of the disclosure) but which also may be confusing to the consumer.

Even in situations where the bank does provide the requesting consumer with a substitute check rather than an original check or a copy, we believe that the second alternative is preferable to the first alternative. The disclosure is more likely to be of greater value and achieve its intended effects of educating consumers if it accompanies the substitute check than if it is provided in advance, as consumers will be more likely to actually read the disclosure and be able to understand it in context if they receive it at the same time they receive the substitute check itself.

Model Disclosure C-5A

The Board has requested comment on the proposed model disclosure that appears as model C-5A in appendix C. The CBA strongly supports the use of a model disclosure as a safe harbor for complying with the statutory disclosure requirements, and commends the Board's efforts in drafting what is generally a clear and accurate notice for consumers. Although we recognize the difficulty in distilling the Check 21 Act and the proposed implementing regulations to a form that is both informative and useful for consumers, it is our view that the model disclosure is not as concise as it could be. It is our concern that the length of the disclosure may discourage some consumers from reading it at all, thereby undermining the educational value of the notice. Further, certain consumers who do read the disclosure may be more confused than is necessary because of the overly detailed and complex language.

Accordingly, we would support an overall simplification of the model disclosure language. However, there are two specific points not fully addressed in the model disclosure which we believe would be helpful to consumers. First, it may be helpful to emphasize, for the consumer's understanding of exactly what a substitute check is and what it is not, either in the first paragraph of the model disclosure or in the section titled "What is a Substitute Check?", that a substitute check is distinct from the electronic images that consumers may already be receiving in their periodic statements in lieu of the original check. Also, we suggest that the section titled "How to Make a Claim for an Expedited Refund" more clearly explain when a substitute check is deemed to have been "made available" to the consumer so that the consumer knows exactly from which date the claim period will run. We suggest that the disclosure language more closely track the language in 229.54(b)(1) in this regard, as it more clearly states that the date on which a substitute check is "made available" is the "day on which the bank mailed or delivered" the substitute check.

Other Model Disclosure Notices

The CBA strongly supports the Board's inclusion of additional model disclosure notices in appendix C, and commends the Board's use of clear, concise and straightforward language.

We believe that they provide useful guidance to banks in drafting their own notices to comply with the additional notice requirements. We also believe that the Board has the authority and we urge the Board to state that these model disclosure statements are sufficient to comply with the Check 21 Act's disclosure requirements.

Purported Substitute Checks

Proposed section 229.51(c) provides that when a bank transfers an item for consideration, purporting it to be a substitute check, and that item satisfies all of the requirements for a substitute check with the exception of the accuracy of the MICR line encoding, as required under the definition of "substitute check" in Section 229.2(z)(2), that item will be treated as a substitute check for certain limited purposes, including the expedited recredit, indemnity and warranty provisions of the Check 21 Act and the proposed amendments. While the CBA agrees that this treatment is necessary to protect the rights of the recipients of such items, we suggest that the Board not limit the "legal equivalency" treatment of such an item simply because it fails to meet the technical requirements of a substitute check solely by reason of inaccurate MICR line encoding. It does not appear to us to be necessary to punish reconverting banks by denying the purported substitute check the legal equivalency of an original check because of an inaccurate MICR line when the warranty and indemnity provisions of the Check 21 Act and the proposed amendments would provide protection to a bank or customer who received such a purported substitute check and suffered a loss because of the inaccurate MICR encoding. Additionally, giving such a purported substitute check complete legal equivalence will give a bank that receives such an item the legal authority to debit its customer's account, and the bank will not be forced to rely merely on the "upstream" recourse provided it by the warranty and indemnity provisions should the customer make a claim of an unauthorized debit.

Accordingly, we suggest to the Board that a purported substitute check that fails to meet the definition of a substitute check solely by reason of an inaccurate MICR line nevertheless be treated as the legal equivalent of an original check for all purposes, not just those limited purposes provided for in proposed section 229.51(c).

* * * * *

Again, the CBA commends the Board's efforts in drafting the proposed amendments and supports their adoption in substantially the form proposed. We appreciate this opportunity to comment on certain provisions of the proposed amendments and thank the Board in advance for your consideration of our comments. If you have any questions about these comments, please do not hesitate to call me at (703) 276-3871 or email me at szeisel@cbanet.org.

Very truly yours,

Steven I. Zeisel
Senior Counsel
Consumer Bankers Association

LIBC/1904690.4